

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARY K. CARPENTER,

Plaintiff-Appellant,

v

SNACKTIME SERVICES, INC.,

Defendant-Appellee.

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UNPUBLISHED

April 5, 2005

No. 252434

Kent Circuit Court

LC No. 01-004630-CZ

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MARY K. CARPENTER,

Plaintiff-Appellee,

v

SNACK TIME SERVICES, INC.,

Defendant-Appellant.

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No. 252761

Kent Circuit Court

LC No. 01-004630-CZ

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right from the trial court's order granting defendant's motions for summary disposition, and defendant appeals as of right from the trial court's order denying defendant's petition for case evaluation sanctions. We affirm in part, reverse in part, and remand.

**I. Facts and Procedure**

In 1994, in the course of employment with defendant, plaintiff was seriously injured in a car accident. Because of plaintiff's injuries, she was no longer able to drive a delivery truck for defendant. Plaintiff sought and received worker's compensation benefits for her injuries. When plaintiff returned to work, defendant reassigned plaintiff to an office assistant position, where her duties included opening boxes and sorting and counting money.

In late 1999, plaintiff developed numbness, tingling, and pain in her right wrist, hand, and lower arm. In April 2000, plaintiff was diagnosed as having carpal tunnel syndrome in her right

wrist caused by the repetitive motions required by her office assistant position. Plaintiff applied for and received worker's compensation benefits in connection with this injury. On August 9, 2000, plaintiff had surgery to relieve the pain caused by the carpal tunnel syndrome. She returned to work a short time later.

At one point, plaintiff told defendant's vice-president, William Shuster, that she had to get a different job because of the difficulties she was having with her hand. In November 2000, plaintiff got another job doing assembly line work. She told Shuster that she had a new job, but was going to try to work both jobs until she was entitled to medical coverage at her new job. However, plaintiff quit her new job after four days of work because she was unable to perform the heavy lifting required for the job.

On November 24, 2000, defendant terminated plaintiff's employment. Shuster explained in the termination letter that he terminated plaintiff because (1) plaintiff told him that she needed a different job, (2) plaintiff told him that she could no longer work for defendant without her wrists hurting, and (3) plaintiff told him that she could not drive in the winter. Shuster explained that he replaced plaintiff when she was out looking for another job and no longer had a position available for her. Shuster testified that defendant terminated plaintiff because defendant replaced plaintiff when she gave her notice of an intent to quit.

On May 4, 2001, plaintiff filed a complaint against defendant, alleging that defendant (1) violated the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, by terminating her employment because of disabilities that were unrelated to her ability to perform the duties of her job, and (2) violated the Worker's Disability Compensation Act (WDCA), MCL 418.301(11), by terminating her employment in retaliation for her filing a worker's compensation claim.

Following a trial in her worker's compensation case, a magistrate issued an opinion finding that plaintiff established a disability arising out of her last day of work on November 27, 2000. The magistrate found that plaintiff credibly testified that her symptoms increased to the point that she could no longer work as an office assistant on her last day of work. The magistrate found that plaintiff was entitled to an open award of wage loss and medical benefits arising out of her November 27, 2000, wrist injury.

The trial court granted defendant's motion for summary disposition of plaintiff's PWDCRA claim. The court explained that the worker's compensation magistrate's finding that plaintiff could not perform the duties of her job with defendant was irreconcilably inconsistent with plaintiff's PWDCRA claim alleging that defendant terminated her employment because of her physical disability. The court held that the doctrine of collateral estoppel precluded plaintiff from asserting that she was so disabled that she could not perform her job, with or without accommodations.

The trial court subsequently granted defendant's motion for summary disposition of plaintiff's WDCA retaliation claim, holding that plaintiff's claim was precluded under the

doctrine of judicial estoppel. The court explained that plaintiff could not receive worker's compensation benefits by claiming that she was not able to perform the job, and then subsequently make a claim in the present case that she is entitled to relief because she was able to perform the job.<sup>1</sup>

Thereafter, the trial court denied defendant's petition for case evaluation sanctions under MCR 2.403(O)(11), holding that sanctions would not serve the interests of justice because the confirmation of plaintiff's worker's compensation award, which prompted the dismissal of the present case, did not occur until about 1½ years after the case evaluation took place.

## II. Analysis

### A. Plaintiff's PWDCRA Claim

#### 1. Standard of Review

Defendant brought its motion for summary disposition under MCR 2.116(C)(10), arguing that plaintiff's claim was barred under the doctrine of collateral estoppel.

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).]

The trial court did not specify under which subrule it granted defendant's motion, but stated that it granted the motion on the basis of collateral estoppel. That the trial court did not specify under which subrule it granted defendant's motion does not preclude appellate review. *Verna's Tavern, Inc v Heite*, 243 Mich App 578, 584-585; 624 NW2d 738 (2000). Summary disposition on the basis of collateral estoppel is pursuant to MCR 2.116(C)(7). *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). In considering a motion under MCR 2.116(C)(7), the court may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party. *Alcona Co, supra* at 246. “ ‘If summary disposition is granted under one subpart of the court rule when it was actually appropriate under another, the defect is not fatal and does not preclude appellate review as long as the record permits review under the correct subpart.’ ” *The Detroit News, Inc v Policemen and Firemen Retirement Sys of the City of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002), quoting *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997).

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<sup>1</sup> As is more fully explained in this opinion, the provision of the WDCA that prohibits retaliation for pursuit of a claim for compensation benefits does not require that a plaintiff demonstrate an ability to perform one's job. The trial court erred in concluding otherwise.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether a claim is collaterally estopped is an issue of law that this Court also reviews de novo. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004).

## 2. Discussion

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition of her PWDCRA claim on the basis of collateral estoppel. "Collateral estoppel precludes relitigation of issues between the same parties." *VanVorous*, *supra* at 479. "Generally, for collateral estoppel to apply three elements must be satisfied: (1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment'; (2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and (3) 'there must be mutuality of estoppel.' *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 n 169 (1988). For collateral estoppel to apply, the ultimate issue to be concluded in the second action must be identical, not merely similar, to the issue involved in the first action. *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994).

Where the earlier proceeding giving rise to the question of collateral estoppel was an administrative one, the doctrine will preclude relitigation of an issue that had been necessarily decided if the administrative proceeding was adjudicatory in nature, a method of appeal was provided, and the Legislature intended the administrative determination to be final in the absence of an appeal. [*Dearborn Heights School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 129; 592 NW2d 408 (1998).]

The doctrine of collateral estoppel has been applied to worker's compensation claims. *Blazic v Wayne Co*, 460 Mich 868; 598 NW2d 346 (1999); *Fuchs v General Motors Corp*, 118 Mich App 547, 553; 325 NW2d 489 (1982).

The resolution of this issue also requires application of the doctrine of judicial estoppel. Under the doctrine of judicial estoppel, " 'a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.' " *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994), quoting *Lichon v American Univ Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990) (emphasis in *Paschke* deleted). A mere assertion of inconsistent positions is insufficient to invoke judicial estoppel; "rather, there must be some indication that the court in the earlier proceeding accepted that party's position as true." *Paschke*, *supra* at 510. "Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent." *Id.*

Plaintiff first argues that an employee who succeeds in receiving worker's compensation benefits is not collaterally estopped from making a PWDCRA claim because the exclusive remedy provision of the WDCA does not bar her PWDCRA claim. The exclusive remedy provision of the WDCA provides, in pertinent part: "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. . . ." MCL 418.131(1).

The cases<sup>2</sup> cited by plaintiff are distinguishable from the present case, as they involve whether the exclusive remedy provision of the WDCA barred the plaintiffs' PWDCRA claims, where the present case deals with whether collateral estoppel bars plaintiff's PWDCRA claim. The trial court did not conclude that the exclusive remedy provision of the WDCA precludes plaintiff from bringing both a WDCA and PWDCRA claim in this case. Instead, the trial court determined that plaintiff's PWDCRA claims are barred because plaintiff's inability to perform her job with defendant was already determined as a matter of fact in the worker's compensation proceedings.

Next, plaintiff argues that the doctrine of collateral estoppel does not apply to her PWDCRA claim because the Legislature intended for the beneficiaries of worker's compensation benefits to be free to bring discrimination claims under the PWDCRA. In *Storey v Meijer, Inc.*, 431 Mich 368, 377; 429 NW2d 169 (1988), our Supreme Court quoted 2 Restatement Judgments, 2d, § 83, p 267:

(4) An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that:

(a) The determination of the tribunal adjudicating the issue is not to be accorded conclusive effect in subsequent proceedings; or

(b) The tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question.

Because collateral estoppel is a judicial creation, the Legislature is free to modify its strict application in any given statutory scheme. *Nummer v Dep't of Treasury*, 448 Mich 534, 544; 533 NW2d 250 (1995). But because the PWDCRA does not contain a provision specifically stating that common-law preclusion rules do not apply to this statutory scheme, the Court must determine whether such an intent can be inferred from the statutory scheme. *Id.* "In doing so, it must be remembered that the Legislature is deemed to legislate with an understanding of common-law adjudicatory principles." *Id.*

Plaintiff argues that the Legislature manifested its intention to allow a recipient of worker's compensation benefits to make a claim under the PWDCRA by including the following provision mitigating compensation awarded for lost wages:

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<sup>2</sup> Plaintiff cites *Napier v Jacobs*, 145 Mich App 285, 302; 377 NW2d 879 (1985), rev'd 429 Mich 222; 414 NW2d 862 (1987); *Beauregard v Clarke-Gravely Corp.*, 131 Mich App 559, 563-564; 346 NW2d 48 (1982); and *Pacheco v Clifton*, 109 Mich App 563, 565; 311 NW2d 801 (1981), aff'd sub nom *Boscaglia v Michigan Bell Telephone Co.*, 420 Mich 308; 362 NW2d 642 (1984).

The amount of compensation awarded for lost wages under this act for an injury under article 2 shall be reduced by the amount of compensation received for lost wages under the worker's disability compensation act of 1969 . . . for that injury and by the present value of the future compensation for lost wages to be received under the worker's disability compensation act of 1969 . . . for that injury. [MCL 37.1606(4).]

Plaintiff contends that by enacting this section of the PWDCRA, the Legislature contemplated allowing a recipient of worker's compensation benefits to proceed with a PWDCRA claim. "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

Plaintiff is correct that MCL 37.1606(4) shows that the Legislature contemplated situations where an individual can successfully pursue a PWDCRA claim while receiving worker's compensation benefits. C.f., *Paschke, supra* at 514 (in which our Supreme Court held that the plaintiff, who received unemployment benefits, was not estopped from claiming worker's compensation benefits because the offset provision of the worker's compensation statute, MCL 418.358, shows that the Legislature contemplated that a recipient of unemployment benefits could also simultaneously receive worker's compensation benefits). However, while an individual's receipt of worker's compensation benefits does not automatically bar a subsequent discrimination claim under the PWDCRA, this conclusion does not also mean that an individual receiving worker's compensation benefits can never be estopped from claiming relief under MCL 37.1202(1)(b) and (g) (alleging that his employer discharged him because of a disability that is unrelated to his ability to perform the job). Plaintiff points to no provision of the WDCA that implies that a decision made by a worker's compensation magistrate and affirmed by the Worker's Compensation Appellate Commission should not be given conclusive effect in subsequent proceedings. Therefore, although MCL 37.1606(4) recognizes that an individual can bring a PWDCRA claim while receiving worker's compensation benefits, it does not preclude a plaintiff who was awarded worker's compensation benefits from being estopped from making a PWDCRA claim in some situations.

Next, plaintiff argues that collateral estoppel does not apply because the issues in her PWDCRA claim are not identical to the issues decided in her worker's compensation case. Under the WDCA, an employee must establish that he has suffered "a personal injury arising out of and in the course of employment" in order to be eligible for compensation. *Rakestraw v Gen Dynamics Land Sys*, 469 Mich 220, 225; 666 NW2d 199 (2003), quoting MCL 418.301(1). An employee must establish that he is "disabled" under MCL 418.301(4) in order to be entitled to wage loss benefits under the WDCA. MCL 418.301(5).

As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss. [MCL 418.301(4).]

"[T]he plain language of MCL 418.301(4) indicates that a person suffers a disability if an injury covered under the WDCA results in a reduction of that person's maximum reasonable wage earning ability in work suitable to that person's qualifications and training." *Sington v Chrysler*

*Corp*, 467 Mich 144, 155; 648 NW2d 624 (2002). In *Sington*, *supra* at 155, our Supreme Court explained this definition of “disability”:

So understood, a condition that rendered an employee unable to perform a job paying the maximum salary, given the employee’s qualifications and training, but leaving the employee free to perform an equally well-paying position suitable to his qualifications and training would not constitute a disability.

“ ‘To prove a discrimination claim under the [PWDCRA], the plaintiff must show (1) that he is [disabled] as defined in the act, (2) that the [disability] is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute.’ ” *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004), quoting *Chmielewski v Xermac, Inc*, 457 Mich 593, 602; 580 NW2d 817 (1998). A “disability” under article 2, MCL 37.1201-1214, is “[a] determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder” that “substantially limits 1 or more of the major life activities of that individual and *is unrelated to the individual’s ability to perform the duties of a particular job or position . . .*” MCL 37.1103(d)(i)(A) (emphasis added). “ ‘Unrelated to the individual’s ability’ means, with or without accommodation, an individual’s disability does not prevent the individual from . . . performing the duties of a particular job or position.” MCL 37.1103(l)(i). If an individual was physically incapable of performing the duties of his job at the time he was discharged, summary disposition of his PWDCRA claim is proper. *Carr v General Motors Corp*, 425 Mich 313; 322-323; 389 NW2d 686 (1986); *Bowerman v Malloy Lithographing, Inc*, 171 Mich App 110, 116; 430 NW2d 742 (1988).

Here, the worker’s compensation magistrate found that plaintiff could no longer work at her job as of her last day of employment.<sup>3</sup> The magistrate found that plaintiff did not possess the qualifications and training that would enable her to earn the type of wages she earned with her position working for defendant. By awarding plaintiff wage-loss benefits, the worker’s compensation magistrate necessarily concluded that plaintiff’s injury resulted in a reduction of her maximum reasonable wage earning ability in work suitable to her qualifications and training. *Sington*, *supra* at 155. Thus, the magistrate necessarily found that plaintiff’s injury rendered her unable to perform her job or another equally well-paying position suitable to her qualifications and training. *Id.*

This finding by the worker’s compensation magistrate, standing alone, does not require the conclusion that plaintiff is collaterally estopped from pursuing a claim under the PWCRA. In *Paschke*, *supra* at 513, our Supreme Court held that the plaintiff’s receipt of unemployment

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<sup>3</sup> Plaintiff contends that the magistrate did not find that she was unable to work on the day defendant terminated her employment. However, the magistrate clearly stated, “The final issue is whether the plaintiff established a disability arising out of her last date of work on November 27, 2000.” The magistrate then concluded, “Because I find that the plaintiff could no longer work as a money counter as of November 27, 2000, she established a disability beginning that date.”

benefits did not estop his claim for worker's compensation benefits. The Court pointed out that the statutes neither explicitly prohibit the receipt of worker's compensation disability benefits for a period in which unemployment is received, nor do they imply that a claim that one is ready and able to work is inherently inconsistent with a subsequent total disability claim for the same period. *Id.* The Court adopted Professor Larson's explanation why a recipient of unemployment benefits can also claim worker's compensation disability benefits during the same period:

At first glance the two positions may appear mutually exclusive; but the inconsistency disappears when the special meaning of disability in workmen's compensation is remembered, involving, as we have seen, the possibility of some physical capacity for work which is thwarted by the inability to get a job for physical reasons. Thus, the injured claimant may honestly represent to the Employment Security office that he is able to do some work, and with equal honesty tell the Compensation Board later that he was totally disabled during the same period since, although he could have done some kinds of work, no one would give him a job because of his physical handicaps. [*Id.* at 513-514, quoting 1C Larson, Workmen's Compensation, § 57.65, p 10-492.50.]

Plaintiff maintains that this reasoning can be applied to the present case. Just as a person may be able to work and receive unemployment benefits but be totally disabled for worker's compensation purposes, plaintiff argues, a person may be able to perform his job under the PWDCRA but be totally disabled for worker's compensation purposes.

Plaintiff's position is buttressed by *Tranker v Figgie Int'l, Inc (On Remand)*, 231 Mich App 115; 585 NW2d 337 (1998), where this Court held that the receipt of social security disability benefits does not automatically preclude a subsequent claim for discrimination under the HCRA (now known as the PWDCRA), MCL 37.1101 *et seq.*:

Like the ADA, the Michigan Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.* . . . , prohibits discrimination, including in hiring, firing, and advancement. MCL 37.1202 . . . . After its 1990 amendments, it also requires that reasonable accommodations be made to assist the handicapped in performing duties of their employment. MCL 37.1103(e) and (l) . . . . See *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 326-327; 535 NW2d 272 (1995). We agree with the *Swanks [v Washington Metropolitan Area Transit Authority]*, 325 US App DC 238; 116 F3d 582 (1997),] court that the receipt of social security disability benefits should not bar a subsequent claim under the HCRA for the same reasons that it does not bar a subsequent claim under the ADA. The two acts are designed for different purposes and utilize different standards, and requiring a plaintiff to choose between the acts is unreasonable and illogical. Moreover, we agree that the social security definition of "disability" does not require a finding that the individual cannot perform any job under any circumstance. *Griffith [v Wal-Mart Stores, Inc]*, 135 F3d 376, 382 (CA 6, 1998)]. The SSA [Social Security Administration] does not take into consideration that a disabled individual may be able to perform a job with reasonable accommodations. Therefore, it is not inconsistent that a plaintiff could be disabled under the SSA and still be qualified to perform the duties of his job or a job he is seeking with reasonable accommodation under the HCRA. For that



reason, we also agree that judicial estoppel should not bar a subsequent handicapper claim. “The Social Security Administration’s inquiry into an individual’s eligibility for disability benefits focuses on the individual’s ability to do work generally available in the national economy and does not address the possible effect of accommodation on ability to work.” *Whitbeck [v Vital Signs, Inc]*, 325 US App DC 244, 247; 116 F3d 588 (1997)]. Because the focus is different, positions taken before the Social Security Administration are not necessarily contrary to positions taken under the HCRA. [*Tranker, supra* at 121-122.]

Later, in *Kerns v Dura Mechanical Components, Inc (On Remand)*, 242 Mich App 1; 618 NW2d 56 (2000), this Court applied *Tranker* to a similar situation involving judicial estoppel. In *Kerns, supra* at 3-4, the plaintiff, who was receiving social security disability benefits, alleged that the defendant violated the HCRA when it terminated his employment. In concluding that judicial estoppel did not automatically preclude the plaintiff’s discrimination claims, this Court relied on *Tranker* and *Cleveland v Policy Mgt Systems Corp*, 526 US 795; 119 S Ct 1597; 143 L Ed 2d 966 (1999). This Court adopted the holding of *Cleveland, supra* at 797, where the United States Supreme Court held that the pursuit and receipt of social security disability benefits does not automatically estop the recipient from pursuing an ADA discrimination claim. *Kerns, supra* at 6. In *Cleveland, supra* at 798-799, the plaintiff asserted in her application for social security disability benefits that she was “disabled” and “unable to work,” but in her ADA complaint, she asserted that she could still perform the essential functions of her job. The United States Supreme Court held that despite the seeming conflict, the two assertions were not mutually exclusive because the SSA does not consider whether the applicant for benefits could perform the job with reasonable accommodation, where the ADA does take this factor into account. *Id.* at 802-803. Thus, a plaintiff can be “disabled” for the purpose of social security disability benefits and still be able to perform the essential functions of a job if reasonable accommodation is provided.

*Tranker* and *Kerns* are applicable to cases involving recipients of worker’s compensation benefits who subsequently make PWDCRA claims. Neither the SSA nor the WDCA definitions of “disability” require a finding that the individual cannot perform any job under any circumstance; the SSA and WDCA do not take into consideration that a disabled individual may be able to perform a job with reasonable accommodation. As explained in *Tranker, supra* at 122, it is not inconsistent that a plaintiff could be disabled under the SSA and still be qualified to perform the duties of his job or a job he is seeking with reasonable accommodation under the HCRA. *Kerns, supra* at 7; *Tranker, supra* at 122. Similarly, it is not inconsistent that a plaintiff could be disabled under the WDCA and still be able to perform the duties of a particular job or position with the proper accommodation under the PWDCRA. In other words, the criteria for determining whether one is disabled under the WDCA and the PWDCRA are different.

Although a recipient of worker’s compensation benefits is not automatically estopped from bringing a PWDCRA claim, the worker’s compensation recipient may still be judicially estopped from bringing a subsequent PWDCRA claim because of assertions made by the recipient at the worker’s compensation hearing. A plaintiff’s statements made in a prior claim for worker’s compensation benefits may weigh against him in his subsequent PWDCRA claim. *Tranker, supra* at 122-123. For example, a PWDCRA plaintiff, who in support of his claim for

worker's compensation benefits told the Worker's Compensation Board that he could not perform the job even with accommodation, could well be estopped from asserting, for PWDCRA purposes, that accommodation would have allowed him to perform that same job. See *id.* at 123, quoting *Swanks, supra* at 243.

In *Kerns, supra* at 7-8, this Court explained that the effect of a plaintiff's statements to an administrative agency (the SSA in *Kerns* or the worker's compensation board in the instant case) depends on whether those statements were factual or legal assertions. If a plaintiff makes a legal assertion in his claim for benefits, such as that he was disabled for social security or worker's compensation purposes, he would be required to present some explanation regarding the apparent inconsistency with his subsequent assertions in his discrimination case that he could perform the essential functions of the job:

“[A]n ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation. . . .

. . . When faced with a plaintiff's previous sworn statement asserting ‘total disability’ or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless ‘perform the essential functions’ of her job, with or without ‘reasonable accommodation.’ ” [*Id.* at 6, quoting *Cleveland, supra* at 806-807.]

In such cases, the appropriate remedy is to remand to the trial court to afford the plaintiff the opportunity to reconcile his representation of disability for social security purposes with his discrimination claim. *Id.* at 7. On the other hand, if a plaintiff makes a factual assertion (e.g., that he cannot stand) in his claim for disability benefits, summary disposition of the plaintiff's subsequent discrimination claim would be appropriate if the plaintiff's factual assertion amounts to an admission that he cannot perform the essential functions of the job with or without reasonable accommodation. *Kerns, supra* at 7-11.

Applying the above-cited legal principles to the facts presented in this case, we conclude that plaintiff is judicially estopped from pursuing her PWDCRA claim because of assertions she made during her worker's compensation hearing. Specifically, plaintiff admitted that there was no accommodation that defendant could provide to allow her to perform her job.<sup>4</sup> Plaintiff's

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<sup>4</sup> Plaintiff admitted in her deposition that she never asked defendant to accommodate her in any way to enable her to perform her job. Plaintiff only gave defendant a letter from her rehabilitation therapist, listing several suggestions of actions the parties could take to ease plaintiff's discomfort. The therapist suggested that defendant should provide plaintiff with a slanted work surface, raise the countertops three inches, and raise plaintiff's work station five inches. Defendant built a platform to raise plaintiff's work station. Plaintiff used plastic bags to give herself a slanted work surface, which she admitted worked as effectively as if defendant had

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admission that defendant could have done nothing more to accommodate plaintiff, along with the conclusion of the worker's compensation magistrate that plaintiff could not perform her job, demonstrate as a matter of law that plaintiff could not perform her job, with or without accommodation. Thus, plaintiff failed to create a genuine issue of material fact regarding her PWDCRA claim, and the trial court properly granted defendant's motion for summary disposition, albeit the motion should have been granted under MCR 2.116(C)(10) rather than (C)(7).

## B. Plaintiff's WDCA Retaliation Claim

### 1. Standard of Review

Defendant brought its motion for summary disposition under MCR 2.116(C)(8), arguing that plaintiff was judicially estopped from bringing her WDCA retaliation claim. At the hearing, however, defendant argued that it was bringing the motion under MCR 2.116(C)(10). The trial court granted defendant's motion on the basis of judicial estoppel under MCR 2.116(C)(7). Plaintiff argues that because defendant originally brought its motion under MCR 2.116(C)(8), the trial court should have considered only the pleadings in deciding whether to grant the motion, as set forth in MCR 2.116(G)(5). Plaintiff argues that defendant was not entitled to summary disposition under MCR 2.116(C)(8) because her complaint alleged all of the elements of a retaliation claim under the WDCA. However, the trial court correctly proceeded under MCR 2.116(C)(7) rather than (C)(8). "[W]here a party brings a summary disposition motion under the wrong subrule, the trial court may proceed under the appropriate subrule as long as neither party is misled." *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). Summary Disposition under MCR 2.116(C)(7) is proper when a claim is barred by judicial estoppel. Accordingly, we apply the legal standard for motions under MCR 2.116(C)(7).<sup>5</sup>

### 2. Discussion

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition of her WDCA retaliation claim on the basis of judicial estoppel. The applicable provision of the WDCA provides:

A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or cause to be instituted a proceeding under [the WDCA] or because of the exercise by the

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(...continued)

built her a slanted work surface. Plaintiff never asked defendant to build her a slanted work surface or raise the countertops.

<sup>5</sup> Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition of her WDCA claims under MCR 2.116(C)(10), because she established a question of fact regarding whether she was able to do her job when she was terminated. However, the trial court did not grant defendant's motion for summary disposition on the basis that plaintiff failed to submit evidence supporting the elements of a retaliation claim under the WDCA. Rather, the trial court granted defendant's motion under MCR 2.116(C)(7) on the basis of judicial estoppel.

employee on behalf of himself or herself or others of a right afforded by [the WDCA]. [MCL 418.301(11).]

In order to succeed in a WDCA retaliation claim, plaintiff has the burden of proving that “(1) he asserted his right for worker’s compensation, (2) defendant laid off or failed to recall plaintiff, (3) defendant’s stated reason for its actions was a pretext, and (4) defendant’s true reasons for its actions were in retaliation for plaintiff’s having filed a worker’s compensation claim.” *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999).

Defendant maintains that a cause of action for a WDCA retaliation claim cannot exist if the plaintiff is unable to perform the job. However, defendant cites no law supporting this proposition. Nothing in MCL 418.301(11) supports defendant’s argument. This statutory provision protects against retaliatory conduct and makes no mention of the ability to perform the job. We hold that a plaintiff is not required to prove his capacity to perform the job in order to bring a WDCA retaliation claim. The trial court erred in granting defendant’s motion for summary disposition of plaintiff’s WDCA retaliation claim on the basis of judicial estoppel.<sup>6</sup>

### C. Case Evaluation Sanctions

Because we conclude that the trial court erred in granting defendant’s motion for summary disposition regarding plaintiff’s WDCA retaliation claims, the matter is remanded for trial. Because there is not yet a verdict in this case, the trial court did not have the authority to award case evaluation sanctions, MCR 2.403(O)(1), and defendant’s argument is moot.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra  
/s/ Janet T. Neff  
/s/ Jessica R. Cooper

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<sup>6</sup> Although defendant does not argue that there were alternative grounds for the trial court to grant defendant’s motion for summary disposition, it may be argued that the trial court should have granted defendant’s motion under MCR 2.116(C)(10). Defendant’s president, Henry Shuster, continually encouraged plaintiff to pursue worker’s compensation benefits, even after she was terminated by defendant. Plaintiff presents little or no facts supporting her argument that defendant’s reason for terminating her employment (that plaintiff gave notice that she intended to quit the job) was a pretext, and that defendant’s real reason for terminating her employment was retaliation for her filing of worker’s compensation claims. On remand, the trial court may consider whether summary disposition of the WDCA retaliation claim is appropriate under MCR 2.116(C)(10).